

two separate accounts, for the appointment of a receiver and, if necessary, only, for the administration of the entire estate of Ang Kim Boey.

I would set aside the order of the learned judge of March 22, 1976, dismissing the appellant's application with costs and also set aside the order granting the respondent's application for an order for Accounts and the appointment of a receiver and if necessary, administration of the estate of Ang Kim Boey. The appellant is entitled to her costs here and in the court below.

In conclusion I would endorse most heartily the comments of the learned President as to the extreme undesirability of the result at which we have perforce arrived. I agree that amending legislation restoring the jurisdiction of the High Court is urgently required and that such legislation should be retrospective. For my part, I would prefer to see it rendered retrospective to the date of the coming into force of the Probate and Administration Enactment 1955, thus putting beyond doubt the legality of any suits regarding probate and administration which may have been litigated before the High Court in the meantime.

Leonard J.A.: I agree and have nothing to add save to voice my support for the recommendation made by my brothers as to the advisability of further legislation.

Appeal allowed.

A MALAYSIAN REPORTS

LIM KAR BEE v. ABDUL LATIF BIN ISMAIL

[F.C. Gill C.J. (Malaya), Ong Hock Sim & Raja Azlan Shah F.J.J.] August 18 and September 24, 1977]
[Kuala Lumpur — Federal Court Civil Appeal No. 24 of 1977]

Tort — Negligence — Nuisance — Steel pipes left on side of road — Injuries sustained when motorcyclist crashed into pipe — Contributory negligence — Interest on damages — Civil Law Act, 1956, s. 11.

Practice and Procedure — Damages — Interest on damages — R.S.C. 1957, O. 40 r. 11 — Civil Law Act, 1956, s. 11.

Damages — Quantum agreed — Amount not paid into court — Interest.

The respondent had claimed damages for personal injuries as a result of an accident on a road. The respondent's case was that in trying to avoid a child crossing the road about 10 feet ahead of him he swerved his motor-cycle to the left and in so doing crashed into a 32" steel pipe which had been left lying about 3 feet to 4 feet from the near side of the road for the past one or two years. The pipe had a sharp steel-rim edge exposed and that constituted, as the learned trial judge held, a potential danger to road users. As a result of the accident the left leg of the respondent had to be amputated. The case was founded on alleged negligence and alternatively on alleged nuisance. The learned trial judge held that on both issues the defendant was wholly to blame. At the hearing the appellant's counsel had admitted liability and urged contributory negligence on the part of the respondent. The quantum of damages was agreed at \$35,000. The learned trial judge awarded interest from the date of the service of the writ. The appellant appealed to the Federal Court.

Held, (Gill C.J. and Raja Azlan Shah F.J., Ong Hock Sim F.J. dissenting): (1) it was the duty of the appellant when placing the pipes on the highway to consider the risk of collision as one of the factors affecting the work he had undertaken and to avoid that hazard by not placing the pipes in that particular spot for an unduly long time before work commenced and the failure to consider these factors and to reach that conclusion and having reached that conclusion to put it into effect, constituted a breach of duty;

(2) on the facts it could not be said that the respondent was partly to blame for the injury he sustained;

(3) the pipes in the condition they were constituted a danger to persons using the road and thereby constituted a nuisance and the appellants were liable for the injury caused to the respondent;

(4) the learned trial judge was correct in ordering interest to be paid from the date of service of the writ, as although the quantum was agreed, the amount was not paid into court.

Cases referred to:-

- (1) *Searle v. Wallbank* [1947] A.C. 341.
- (2) *Lavine v. Morris* [1970] 1 All E.R. 144.
- (2a) *Gray v. Pullen* (1864) 5 B. & S. 970.
- (2b) *Govinda Raju & Anor. v. Laws* [1966] 1 M.L.J. 188, 190.
- (3) *Lewys v. Burnett* [1945] 2 All E.R. 555, 560.
- (4) *J.W. Dewhurst Ltd. v. Ratcliffe* (1951) 101 L.J. 361.
- (5) *Tart v. Chitty* [1933] 2 K.B. 453.
- (6) *Butterfield v. Forrester* 11 East 60.
- (7) *Levine v. Morris* [1970] 1 All E.R. 144, 148.
- (8) *London Passenger Transport Board v. Upson* [1949] A.C. 155, 176.
- (9) *Hay or Bourhill v. Young* [1943] A.C. 92, 104.
- (10) *Hughes v. Sheppard* 163 L.T. 177, 179.
- (11) *Trevett v. Lee* [1955] 1 W.L.R. 113, 116-117.
- (12) *Farrell v. John Mowlem & Co. Ltd.* [1954] 1 Lloyd's Rep. 437, 439.
- (13) *Dymond v. Pearce* [1972] 1 Q.B. 496; [1972] 1 All E.R. 1142.

- (14) *Wills v. T.F. Martin Roof (Contractors) Ltd.* The Times, January 21, 1972; [1972] 1 Lloyd's Rep. 541.
- (15) *Doyle v. Olby* [1969] 2 Q.B. 158, 166.
- (16) *Hollington v. Hewthorn & Co. Ltd.* [1943] 2 All E.R. 35.
- (17) *Crane v. South Suburban Gas Co.* [1916] 1 K.B. 33.
- (18) *Latham v. R. Johnson & Nephew* [1913] 1 K.B. 398, 413.
- (19) *Heaven v. Pender* (1883) 2 Q.B.D. 503.
- (20) *Donoghue v. Stevenson* [1932] A.C. 562, 580.
- (21) *Anns v. London Borough of Morton* [1977] 2 All E.R. 492, 498.
- (22) *The Wagon Mound (No. 2)* [1967] 1 A.C. 617, 639.
- (23) *Scott v. Shepherd* 96 E.R. 525.
- (24) *Shiffman v. The Venerable Order of the Hospital of St. John of Jerusalem* [1936] 1 All E.R. 557, 561.
- (25) *Thompson v. Bankstoun Corporation* (1953) 87 C.L.R. 630.
- (26) *Candler v. Crane Christmas & Co.* [1951] 2 K.B. 164, 192.
- (27) *Brophy v. Shaw* The Times, June 25, 1965.
- (28) *K.R. Taxi Service Ltd. v. Zaharah* [1969] 1 M.L.J. 49, 52.
- (29) *Morton v. Wheeler* The Times, February 1, 1956.
- (30) *Harrold v. Watney* [1898] 2 Q.B. 320.
- (31) *Jewson v. Gatti* 2 Times L.R. 381, 441.
- (32) *Harrison v. Rutland (Duke of)* [1893] 1 Q.B. 142.
- (33) *Barnes v. Ward* (1850) 19 L.J. (C.P.) 195.
- (34) *Ann Hardcastle v. The South Yorkshire Railway and River Dun Company* (1859) 4 H. & N. 67.
- (35) *Jefford v. Gee* [1970] 1 All E.R. 1202.
- (36) *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* [1893] A.C. 429, 437.

The following cases were also cited in argument: *In re Polemis and Furness Withy & Co.* [1921] 3 K.B. 560; *Fisher v. Ruislip-Northwood Urban District Council and Middlesex County Council*, [1945] 1 K.B. 584, 593-597, 584; *Griffiths v. Liverpool Corporation*, [1966] 2 All E.R. 1015; *Almeroth v. W.E. Chivers & Sons, Ltd.* [1948] 1 All E.R. 53, 54C; *Caseley v. Bristol Corporation*, [1944] 1 All E.R. 14; *Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E.R. 339, 344.

FEDERAL COURT.

V. Krishnan for the appellant.

R.K. Nathan for the respondent.

In the court below the following judgment was delivered on April 4, 1977:

Abdul Hamid J.: The plaintiff's claim is for personal injuries suffered by him on June 1, 1972. It is founded upon negligence, alternatively nuisance of the defendant and in so far as it is necessary in the doctrine of *res ipsa loquitur*.

At all material times, the plaintiff was the rider of motor cycle BG 8432 and the defendant was a contractor under contract with the Selangor State Government for laying 32 inch pipes along Jalan Sungai Besi/Kuala Lumpur and was at all material times in charge of storing and laying the said pipes.

There were 32 inch pipes stored along the side of Jalan Sungai Besi on the material date.

It is the plaintiff's case that on June 1, 1972 at about 1.30 p.m., he was riding his motor cycle along Jalan Sungai Besi from Kuala Lumpur to Sungai Besi. After passing the junction of Jalan Kuchai Lama for a distance of about three lamp posts, (approximately 200 feet, a boy crossed the road from left to right about 10 feet away. The plaintiff applied the brake

A and swerved to the left to avoid the boy. In so doing, he knocked into the pipes lying on the road side. The plaintiff indicated that he came from the direction of the stationary motor car shown in photo 3 in the Non-Agreed Bundle. The pipes are also shown in that photograph and in photos 1 and 2. The left side of the motor cycle and the plaintiff's left leg hit the pipes.

B The plaintiff agreed that he used the road daily and he knew the pipes were lying by the side of the road for one or two years. He maintained that there was no warning sign (counsel for the defendant conceded that there was none around the place where those pipes were lying). The plaintiff disagreed that there was a warning sign at the beginning of Jalan Sungai Besi. He also disagreed that the pipes were lying three to four feet from the side of the road. He did not dispute that the area was a built-up area and there were cyclists and pedestrians.

C The defendant stated in evidence that he was laying the pipes along Jalan Sungai Besi and these pipes were lying along the side of the road. He maintained that there was a warning sign stating that there was construction work and laying of pipes along the road. Work around the place of accident had not yet started. According to the defendant the pipes were placed four to six feet away from the side of the road and at the place of accident they were placed four feet away as there was a slope. However, he maintained that there was room for pedestrians to walk and there was no obstruction to traffic.

D Under cross-examination, the defendant stated that he could not remember the last time he visited the scene. It is revealed that he left the matter entirely in the hands of the kepala. The defendant was unable to say when he placed the pipes along the road. He agreed that the pipes were left there one or two years prior to the date of the accident.

E Raman Nair, the defendant's foreman for the pipe laying operation, testified that there was a sign at the beginning of Jalan Sungai Besi to warn the public that there were pipes along the side of the road and there were signs at the place where the pipes were being laid. It is revealed from Raman Nair's testimony that the pipes were placed between three to six feet away from the edge of the road depending on the area available.

F On the facts before me it is not disputed that the pipes had been lying there for at least two years. The outer edges of the pipes seemed to have worn out exposing sharp steel rims. These pipes are shown from the photograph to be lying very close to the edge of the road. There was no warning sign at or around the place of accident.

G It is the defendant's contention that the plaintiff was travelling daily along this road and he knew of the existence of those pipes as they were clearly visible.

H Mr. Krishnan counsel for the defendant drew the court's attention to page 285 of *Bingham's Motor Claims Cases* 7th edition the chapter under the heading "Nuisance on Highway" in particular the case of *Searle v. Wallbank*.⁽¹⁾ At page 285 two definitions

of what constitutes "nuisance" the first from *Salmond on Torts* (13th ed.) pages 182, 183 and the other from *Winfield's Law of Tort* (3rd ed. page 246) respectively are as follows —

"The generic conception involved in nuisance may, however, perhaps be found in the fact that all nuisances are caused by an act or omission, whereby a person is unlawfully annoyed, prejudiced or disturbed in the enjoyment of land; whether by physical damage to the land or by other interference with the enjoyment of the land or with his exercise of an easement, profit or other similar right or with his health, comfort or convenience as occupier of such land... the basis of the law of nuisance is the maxim *sic utere tuo ut alienum non laedas*: a man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour.

'Nuisance is the unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it.' If a person's right of free passage over a highway is subject to interference he has an action, just as he would have if a private right of way of which he was the grantee was obstructed."

The case of *Searle v. Wallbank, supra*, does not seem to be relevant to the present case. In that case, the defendant's mare leapt over or through a hedge bordering on the highway on to the petrol tank of the motor cycle ridden by the plaintiff. The defendant was found negligent for failing to prevent the mare from getting on to the highway. On appeal it was held that the owner was not liable because the animal leapt over or through the hedge or otherwise down on the user of the highway. The decision was based on the ground that there was no obligation on the owner or occupier of a field adjacent to a highway to maintain a fence on the border of a highway.

On the other hand, Mr. R.K. Nathan pointed out that section 12 of the Minor Offences Ordinance, 1955 under the heading "nuisance" creates offences in relation to public roads one of which is for laying without lawful authority or excuse stone, brick or other article on any public road so as to cause an obstruction thereto or so as to make the use of the road less convenient. "Public road" is defined under the Ordinance to mean "every road, street, bridge, passage, footway or square over which the public have a right of way."

The definition seems wide enough, I think, to include the road and its side tables normally used by pedestrians and cyclists. In view of this section it would seem necessary to determine whether the defendant had, in the circumstances of this particular case, committed a breach of this section. I hasten to add that the civil liability of the defendant may not be wholly dependent upon the breach of this provision, in the event there is such a breach, but I fail to see why evidence of such a breach may not be relied upon by the plaintiff as evidence tending to establish any liability which is in question in these proceedings. In the present case it is not disputed that the defendant had placed the pipes on the side of the road and they had been there for an unduly long time. Even though there is evidence that he had tendered for the pipe laying project, there is nevertheless, no evidence before the court to show that he had lawful authority to place the pipes along the side of the road. It may, however, be argued in favour of the defendant

A that he had lawful excuse to place those pipes there as he had tendered or by then commenced to lay the pipes, but as against it, I do not think he can argue that he had lawful excuse to store the pipes there for an unduly long time. There may only be merit in the argument if it is shown that the pipes had been placed there within a reasonable period before the commencement of the work. By placing those pipes there for an unduly long time the defendant could not have not known that they would cause an obstruction to other road users not only to pedestrians and cyclists but in all probability to motor cyclists and motorists who in an agony of the moment may be compelled to pass along that part of the road. Moreover the presence of these pipes would certainly render the use of that part of the road less convenient. Furthermore the road at the point where the accident occurred was only 22 feet 1 inch wide and in the light of the defendant's own contention that this was a built-up area with a lot of pedestrians and cyclists, it is indeed not open to the defendant to argue that the presence of those pipes had left plenty of room for pedestrians, cyclists and other road users to pass along that part of the public road.

In the present case it is evident that the plaintiff was compelled to proceed to that part of the road and as a result he suffered injuries substantially on account of the presence of those pipes. He might or might not have sustained injuries but that is something that this court shall not have to speculate. However, I am satisfied that in all probability he might not have sustained those injuries revealed before this court had it not been for those pipes.

It is to be observed that these pipes had been left there for so long that their edges were so worn out exposing steel rims that they were potentially dangerous to road users. Above all the condition of these pipes plainly show that they had been left there without any care whatever being taken to see that they would not pose danger to road users. The onus, I think, is cast upon the defendant to show that he had taken reasonable precaution to see that the presence of those pipes would not be unsafe to road users. On consideration of the evidence before the court and having regard to the circumstances of this particular case, it is overwhelmingly clear to my mind that the defendant had at no time exercised reasonable care in respect of the articles placed by him upon the said road to ensure safety of road users. It is not open to him in the circumstances to say that the plaintiff himself knew of the presence of the pipes.

The case of *Lavine v. Morris*⁽²⁾ cited by Mr. Nathan somewhat supports the proposition that it is evidence of negligence if regard is not given to placing the articles "foreseeably likely to give rise to unnecessary and grave hazards to users of the carriage-way." Mr. Nathan has cited a number of other cases but I do not really consider it necessary to deal with each and every one of them in the light of the overwhelming evidence pointing to the fact that the defendant had not only been negligent in his failure to take reasonable and adequate precaution in regard to foreseeable danger posed by the pipes. The placing of those pipes in the manner he did and under such circumstances indeed constituted a nuisance.

For reasons that I have stated, it is my considered judgment that the defendant is wholly to blame for the personal injuries suffered by the plaintiff.

Quantum had been agreed in the sum of \$35,000 and I therefore entered judgment for the plaintiff accordingly with costs.

The defendant appealed to the Federal Court. The Federal Court, dismissing the appeal, delivered the following judgment on September 24, 1977:

Gill C.J. (Malaya): I have had the benefit of reading in draft the judgment of my learned brother Raja Azlan Shah F.J. For the reasons very fully set out by His Lordship, to which I feel I cannot usefully add anything, I too am of the opinion that the appeal should be dismissed with costs.

Ong Hock Sim F.J.: This is an appeal from a judgment of the High Court at Kuala Lumpur awarding damages in the sum of \$35,000 in respect of personal injuries sustained by the respondent based on a 100% liability of the appellant.

Evidence was recorded from the respondent and a photographer in support of his claim. The appellant gave evidence and called his kepala. In my view, the facts are simple and straightforward. The claim was founded on negligence and alternately on nuisance. The learned judge held on both these issues the defendant was wholly to blame. With respect, I do not think there was evidence to support his conclusions on either.

It is necessary for a proper appreciation to set out the undisputed facts. On June 1, 1972 the respondent was riding his motor-cycle BG8432 along Jalan Sungei Besi from the direction of Kuala Lumpur at about 1.30 p.m. The road was 22 feet 1 inch wide at the scene of the accident. There was no evidence that weather conditions or visibility were unfavourable. On his own admission, the respondent agreed that the area was a built-up area. There were cyclists and pedestrians. "I was travelling at about 20-25 m.p.h. There was no other vehicle on the road." He said that he swerved to the left to avoid a boy who was crossing the road from the left to the right. In doing so, he knocked into the pipes, which had been laid alongside the road, *but off the road*, by the appellant who had a contract with the Selangor State Government for construction and laying of pipes along Jalan Sungei Besi. As a result of the injuries sustained, his left leg was amputated.

In arriving at his decision, the learned judge said:—

"On the facts before me it is not disputed that the pipes had been lying there for at least two years. The outer edges of the pipes seemed to have worn out exposing sharp steel rims. These pipes are shown from the photograph to be lying very close to the edge of the road. There was no warning sign at or round the place of accident."

The recorded evidence would not agree that these findings were not disputed. Both respondent and appellant stated that the pipes were there 'for one or two years.' The accident was in June 1972. There was no evidence to support the learned judge's observation "that these pipes had been left there for

A so long that their edges were so worn out exposing steel rims that they were potentially dangerous to road users." Paragraph 4 of the Statement of Claim beyond stating that the pipes had exposed steel rims did not allege that they had become sharpened by reason of being left there for an unduly long time. How close the pipes were from the edge of the road does not appear to me to pose potential danger to road users. As *Salmond on Torts* (13th Edition) at page 242, quoting *Romer L.J. in Gray v. Pullen*^(2a):—

B "The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others."

C While a duty of care is imposed on any person authorising or procuring the doing in any highway of any dangerous act, no such duty is cast upon him in the use of the highway for ordinary purposes of passage. Dangers incidental to the ordinary use of a highway for purposes of traffic must be expected. D Were the pipes *per se* potentially dangerous to "road users" in the position they were? Must the appellant have in contemplation road users who "might fall or be caused to fall" — by what, whom, how or why — on to such exposed steel rims? [See paragraph 4(d)]. Why should they so fall, if they were using the road for ordinary purposes of passage? E There was no evidence that there was any obstruction to the free flow of traffic. As respondent agreed "there were cyclists and pedestrians." There was dispute with regard to warning signs between respondent and the appellant, but at the time of the day of the accident and respondent's awareness of the presence of those pipes, it seems to me that factor F is not relevant to the consideration of culpability.

The learned judge quoted the definitions of nuisance from *Salmond on Torts* (13th Edition) pages 182-183 and from *Winfield's Law of Tort* (3rd Edition) page 426. With respect again, in the instant case, did the presence of those pipes in any way interfere with the respondent's right of free passage? Reference was made to the Minor Offences Ordinance 1955, where in section 12(a) under the heading of "nuisance", there was a prohibition against the laying on a public road of stone, brick or other article so as to cause an obstruction thereto or so as to make the use of the road less convenient." I do not think it competent for the learned judge to extend the definition of "public road" to "include its side tables normally used by pedestrians and cyclists." Section 2 defines "public road includes every road street bridge passage footway or square over which the public have a right of way." In my view, he was misled by the further words of the definition which reads "and the expression 'in or near any public road' includes all places in the public road and all places within ten years of it and not effectually separated from and hidden from the road by a wall or otherwise." Although he said: "In view of this section it would seem necessary to determine whether the defendant had, in the circumstances of this particular case, committed a breach of this section," it seems

to me that he must have prejudged there was such a breach, because he went on "I fail to see why evidence of such a breach cannot be relied upon by the plaintiff to establish any liability which is in question in these proceedings." It was never alleged that the appellant had no "lawful authority" or "lawful excuse" to lay the pipes where he did, but the learned judge had this to say: "there is no evidence before the court to show that he had lawful authority to place the pipes along the side of the road. It may, however, be argued in favour of the defendant that he had lawful excuse ... as he had tendered or by then commenced to lay the pipes, but as against it, I do not think he can argue that he had lawful excuse to store the pipes there for an unduly long time." Lawful authority or excuse was only required under section 12(a) for laying articles on the road. It was admitted the appellant had a contract with the Selangor Government, upon whose property the pipes were laid. It must surely be a matter for the Selangor Government whether the appellant was complying with the terms of his tender or carrying out the operations in a normal and competent manner. I am unable to understand why it was said that "by placing those pipes there for an unduly long time the defendant could not have not known that they would cause an obstruction to other road users." Where is the evidence of any obstruction? All the evidence was to the contrary — there were cyclists and pedestrians. Where again is there support for the allegations in paragraph 4(j) of causing an interference with the free flow of traffic, or (k) of obstructing the highway and in particular the kerb alongside the highway? The learned judge went on that the pipes would cause an obstruction "in all probability to motor cyclists and motorists who in an agony of moment may be compelled to pass along that part of the road." What is understood by "that part of the road"? Where the pipes were? Surely, it was not expected that that portion is for ordinary use for traffic. And if respondent was compelled to use that portion, was it the fault of the appellant? Did the appellant create the situation resulting in an agony of the moment for the respondent and his electing to leave the road and crash into the pipes which were *not* on the road? I am of the opinion that what Raja Azlan Shah J. (as he then was) said in *Govinda Raju & Anor. v. Laws*^(2b) was misconstrued. He said: —

"To my mind, when a plaintiff is perplexed or agitated ... by the wrongful act of a defendant, it is sufficient if he shows as much ... control in attempting to avoid the accident as may reasonably be expected of him in the circumstances." (emphasis mine)

Again, in my opinion, it cannot be maintained that the pipes rendered the use of Jalan Sungei Besi less convenient. It would appear that only unfavourable inferences were drawn against the appellant. For example, "Furthermore the road at the point where the accident occurred was only 22 feet 1 inch wide, and in the light of the defendant's own contention that this was a built-up area with a lot of pedestrians and cyclists, it is indeed not open to the defendant to argue that the presence of those pipes had left plenty of room for pedestrians, cyclists and other road users to pass along that part of the road." Consider the width of a motor-cycle. Consider the width of

A the road. Consider the pipes were *off the road*. Can there be ground for complaint that appellant had not left plenty of, or any, room for all road users unless they could normally be expected to go over the pipes in the exercise of their right of passage? Also remember *that portion* of the road upon which the pipes were laid was not meant for use by vehicles.

B Perhaps it is not out of place here to return to *Salmond* on the subject of nuisance. [At page 181, which was quoted by Croom-Johnson J. in *Lewys v. Burnett*⁽³⁾]: —

"Thus the obstruction of a highway is a public nuisance."

C It consists either in obstructing it or in rendering it dangerous. (page 239). Examples include, *inter alia*, "leaving ... motor vehicles standing in it for an unreasonable time or in unreasonable number."

D It must be observed that the English cases dealt with obstructions and dangers on the highway and other dangers adjacent to it. In the instant case, the pipes were not on the road but 1 foot or more on the grass verge.

A case in point is *J.H. Dewhurst Ltd. v. Ratcliffe*.⁽⁴⁾ There plaintiffs' motor car in daylight and clear weather while being driven along a road 16 to 18 feet wide at 20 to 25 m.p.h. in giving way to an approaching omnibus brushed a hedge on the near side and collided with a tree stump nearly 4 feet high, one or two inches inside the hedge hidden by leaves and foliage. Plaintiffs sued defendant who was owner of the farm adjoining the road. The tree stump was wholly on defendant's land but did not over-hang the road although less than six inches clear of it. Held the claim in negligence failed because defendant owed no legal duty to the plaintiffs. As regards nuisance, the car driver was not entitled to brush innocent looking leaves and twigs at the roadside and complain if he sustained damage because of something behind them.

Another case I would refer to is *Tart v. Chitty*,⁽⁵⁾ the headnote of which reads: —

G "On the facts the accident happened either because the plaintiff was not keeping a proper look-out or because he was going too quickly and had not his motor cycle under such control that he was able to avoid the collision, and in either event, he was guilty of negligence."

Beyond saying that the collision in that case occurred on a wild night, raining hard and blowing a gale, Swift J. said at pages 455, 456: —

H "It has not been initially disputed before us that the defendants' servants were initially in this matter guilty of negligence. They put upon the highway an obstruction which was improperly lighted in that it had no lights of its own at the back, and in that none of the surrounding lights of the town, the lights of the shop windows or the street lamps, illuminated it at all. The county court judge said that they were negligent in stopping in that position. Then what happened? I The plaintiff ran into it, and it seems to me that he must have run into it for one of two reasons: either he was not keeping a proper look-out, such a look-out as a reasonable man riding a motor cycle along that street would have kept on such a night; or, if he were keeping a proper look-out, he was travelling at such a speed that he was unable to stop his motor cycle or to swerve from the course he was pursuing in such a way as to avoid colliding with the obstruction which had been put in front of him. One of these two things must have happened, and if that be so, then the plaintiff must, in fact and in law, have been guilty of

negligence. The county court judge has said that he was not guilty of negligence. We are not sitting here to review his decision on the facts, nor to come to any conclusion of our own upon the facts if there was evidence upon which the county court judge could come to the conclusion to which he has arrived; we are sitting here merely to see that he has properly applied the law in this case. The question, therefore, is whether we can interfere with what he has done. In my view the question whether there is or is not evidence upon which a judgment may be founded is always a question of law. If there is evidence, then the judgment cannot be disturbed by this court, however profoundly this court may disagree with it. But if there is no evidence then, as a matter of law, the judgment can and ought to be interfered with."

He then went on to quote the headnote in *Butterfield v. Forrester*⁽⁶⁾:—

"One who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction...."

Lord Ellenborough C.J. said (in the case quoted) 'A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. *Two things must concur to support this action*, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.'

It seems to me that when a man drives a motor car along the road, he is bound to anticipate that there may be people or animals or things in the way at any moment, and he is bound to go not faster than will permit of his stopping or deflecting his course at any time to avoid anything he sees after he has seen it." (emphasis mine).

Before I refer to other cases, it is perhaps appropriate to consider whether defendant was not himself to blame. He gave two versions why he swerved. The first "*When I came out of that corner, I saw a boy ... about 10 feet away when he crossed the road.*" The second: "*The accident took place after I took the corner. The collision took place about 135 feet away from the corner. I only saw the boy after he started to cross the road ... suddenly. After I passed the corner, I did not see the boy.*" As is clear from the photographs there was no reason for not noticing the boy and with a lot of pedestrians and cyclists, it must be asked whether, in all the circumstances, he had kept a proper look-out and exercised due consideration for other users of the road. Did the appellant create unnecessary hazards on the highway? Were there any steps he could have taken to prevent the pipes becoming a danger to road users? I do not think there were. This was not a case of the pipes rolling on to the highway and occasioning harm to a passer-by or a road-user. I cannot agree that there is any duty to take reasonable care to road users who may *inadvertently* leave the road to collide with them. The word "*inadvertently*" connotes a failure to exercise due care for themselves. *Levine v. Morris*⁽⁷⁾ must be read with the reservation that there the ministry was a highway authority which had failed, as was found, in their duty that *any one skilled in road design would have foreseen* that drivers who had not the fullest degree of skill might leave the road and the danger could have been averted by siting the sign where that risk was eliminated. (See *Bing-*

ham's Motor Claims Cases — 7th Edition — page 280). There the car got into a skid in heavy rain and crashed into massive concrete columns erected by the Ministry of Transport. It should also be noted that it was a *fast traffic highway* and Sachs L.J. said at page 148:—

"It is well known that *on high speed roads there is a risk of motorists going off the carriageway inadvertently through no fault of their own, especially in bad weather*. There are many potential causes of such inadvertent happenings, such as, for example, tyres that burst or, unknown to the driver, are out of balance; indeed, one could frame a long list of causes which carry no blame on the driver. In addition, there are cases in which the accidents are due to that category of negligence which, to adopt the words of Lord du Parc in *London Passenger Transport Board v. Upson*⁽⁸⁾ 'experience and commonsense teach' is likely to occur. — The Ministry owe to the motorists at least a duty when siting massive signs to take reasonable care when there are two sites equally good as regards visibility not to select the one that involves materially greater hazards to the motorists."

In the same case, Widgery L.J. (as he then was) said:—

"Of course, *the duty of the highway authority is limited by the fact that it is only required to do what is reasonable in order to avoid reasonably foreseeable accidents.*" (emphasis mine).

I shudder that my erection of a strong iron gate into which a motorist whose tyre burst and crashed could successfully maintain an action against me for injuries suffered by reason of the presence of the iron gate. As my learned brother Raja Azlan Shah F.J. said "A person who maintains anything on, under, above or adjacent a highway owes a duty to persons lawfully using the highway to prevent damage to their person or property. *This duty is no higher than a duty to exercise reasonable care that persons using it are not unduly inconvenienced or injured by any carelessness on the part of the defendant.*" Where was there a breach of this duty by the defendant? As he quoted from *Hay or Bourhill v. Young*⁽⁹⁾:—"The duty is owed to those to whom *injury may reasonably and properly be anticipated* if the duty is not observed." Are freak accidents not attributable to any contributory cause by the defendant to be compensated by him to a person who has suffered injuries?

I am of the opinion and I would quote from *Hughes v. Sheppard*⁽¹⁰⁾ (per Singleton J.):—

"A public nuisance has been defined as an act not warranted by law, or an omission to discharge a duty, which act or omission obstructs and causes inconvenience or damage in the exercise of rights.... An example of a public nuisance is obstructing a highway or making it dangerous for traffic ... It may be that in a technical sense a nuisance is constituted by the placing of those cans in the road, but, deciding the question on the materials before me, my impression is that there is no actual nuisance. The highway authority have the right to paint the white line and also to do what is reasonably necessary while painting it.... They did no more than was necessary here. Again, it may be that signs at both ends of, and near to, where the work was being done might have drawn attention to it, though I do not know that they would have done so in his particular case, *for the cans and flags were clearly there to be seen by anyone who was looking.* In my opinion, it was not negligent to leave the cans as they were left, and I am not disposed to think that a nuisance was created." (emphasis mine).

In *Trevett v. Lee*,⁽¹¹⁾ Lord Evershed M.R. said:—

"It is axiomatic, as a general proposition, that a man who obstructs a highway commits, and is liable to be charged in

respect of the commission of, a public nuisance. But that short statement is in truth somewhat of an over-simplification, for there is no doubt that not every obstruction of a highway constitutes a public nuisance. It is also well established that a private individual can only sue in respect of a public nuisance if he or she suffers some special damage as a result of it. So far as this case is concerned, that last point may be laid aside, for if there was here a public nuisance and if Mrs. Trevett's injuries were properly attributable to the existence of that nuisance, then beyond a peradventure she did suffer special damage as a result of it."

In *Farrell v. John Mowlem & Co. Ltd.*,⁽¹²⁾ Devlin J. used this language: —

"A person whose property adjoins the highway, for example, has a right of access to and from his property and if, in the exercise of that right of access, he causes as he may do sometimes an obstruction to the public using the highway, the question is whether the obstruction is reasonable or not. There are two sets of rights which have to be met and resolved on the ordinary principle that a reasonable exercise of both must be allowed."

In determining liability even for an obstruction in a highway, as Lord Evershed said at pages 121 and 122: —

"It is, I think, clear on the authorities that the question is one of fact to be determined in view of all the circumstances of the case including, of course, the nature of the locality, the density of the traffic and the extent and duration of the obstruction. ... In so far as able-bodied pedestrians are concerned the obstruction was of the slightest. On balance it seems to me, that carried out with proper precautions, it is impossible to hold that this operation was improper. ...

... it is not open to doubt that in a claim for damages based on nuisance the defendant may set up and rely upon a fault consisting of what is commonly called contributory negligence, so as to reduce or extinguish his own liability." (emphasis mine)

Going on to *Dymond v. Pearce*⁽¹³⁾ (*Bingham's* (cit)) (pages 287-288) in regard to a vehicle parked on a highway, I would reproduce what is therein stated in full: —

"The defendants' driver fetched a large loaded lorry from their depot at 6 p.m. and parked it near his home ready for an early start next morning. It was parked on the outside of a shallow bend on an urban road having two carriage-ways each 24 feet wide. Before lighting-up time the driver turned on the lights. The lorry was under a street light and was visible for at least 200 yards to approaching traffic: it was 7½ feet wide leaving at least 16 feet of the carriage-way unobstructed. After lighting-up time a motor-cyclist, looking round at someone on the pavement, failed to see the lorry and crashed into it. The plaintiff, his passenger, was injured. He based his claim on two grounds: (1) that the lorry was negligently parked and (2) that the lorry was an obstruction and amounted to a common law nuisance, actionable without proof of negligence. The trial judge held that (1) in the manner in which the lorry was parked there was no foreseeable danger and no negligence (2) the mere parking of the lorry on the near-side of the road where it was not foreseeably dangerous did not amount to nuisance at common law (3) the sole cause of the accident was the motor cyclist's failure to look where he was going.

HELD, ON APPEAL: (1) the judge was right in finding that the defendants and their driver had not been negligent in parking the lorry at that place in the way they did; (2) there were two categories of nuisance on a highway, an obstruction which constituted a danger and an obstruction without danger. It was important to remember the two categories when looking at the authorities. In neither category was it necessary to prove negligence as an ingredient, and in both proof of what was *prima facie* a nuisance laid the onus on the defendant to prove justification. Neither category was actionable unless the plaintiff could prove damage had been caused to him. Leaving aside the special position of frontagers (and the driver in this case was not a frontager) the common law rights of users of the highway were normally confined to use for passage and repassage and incidents reasonably associated with such use. Leaving a large vehicle on the highway *prima facie* resulted

A in a nuisance, for it narrowed the highway: in the present case the lorry constituted a nuisance at the time the motor-cyclist ran into it but that did not render the defendants liable to the plaintiff because, as the judge had found, the nuisance was not the cause of the accident — the sole cause was the motor-cyclist's negligence. In most cases that was an inevitable conclusion once negligence on the part of a stationary vehicle was negated. Nevertheless (per Edmund Davies L.J.) a person creating a highway obstruction must be alert to the possibility that weather changes or the actions of third parties might convert what was originally a danger-free obstruction into a grave traffic hazard. In the present case the lorry parked as it was did not present a danger to those using the highway in the manner in which they could be reasonably expected to use it. APPEAL DISMISSED." (emphasis mine)

In the instant case, where the pipes were not on the road or could be considered *per se* dangerous, how can appellant be held liable to the respondent?

In *Wills v. T.F. Martin (Roof Contractors) Ltd.*⁽¹⁴⁾ (*Bingham's* cit.) (page 288), it was held (per Forbes J.): —

"... applying the judgments in *Dymond v. Pearce* (above) the skip's presence was a nuisance whether lit or unlit: it had no business to be on the highway. But the plaintiff must show that the obstruction was at least a cause of the accident. Adopting Edmund Davies L.J.'s test in *Dymond's* case the skip would not be dangerous if adequately lit but would be potentially dangerous if unlit. The plaintiff had not satisfied the court that there was no adequate lighting and had thus not established that the skip was a dangerous obstruction. *Sachs L.J.'s* test in the same case was whether the nuisance was the cause of the accident." (emphasis mine)

E As the learned judge said "he (the respondent) suffered injuries substantially on account of the presence of those pipes. He might or might not have sustained injuries. ... However, I am satisfied that in all probability he might not have sustained those injuries revealed before this court had it not been for those pipes." It is speculative that the respondent could have suffered other serious injuries by going off the road as a result of the boy's wrongful action in crossing the road suddenly. Would he be entitled to damages from the owner of a tree on land adjacent to the highway into which he had crashed in swerving to avoid the boy?

G I find that a very high duty was cast upon the appellant for leaving the pipes there without any care being taken to see that they would not pose danger to road users. He had a kepala and a competent engineer. What more could he do?

H At the hearing, the appellant's counsel, admitted liability and urged contributory negligence on the part of the respondent. He said both were equally at fault or at least, assessed at 75% on the part of the respondent and at 25% on the part of the appellant.

I need only cite *Doyle v. Olby*⁽¹⁵⁾ where Lord Denning M.R. said: —

"It was submitted by Mr. Smout we could not, or at any rate, ought not to correct this error. I do not agree. We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side." (emphasis mine)

In the view I take, neither negligence nor nuisance was proved and I would, therefore, for my part, with due deference to my brethren, allow this appeal and set aside the order of the learned judge with costs here and in the court below.

Raja Azlan Shah F.J.: This is an appeal from a judgment of the High Court at Kuala Lumpur given on April 4, 1977. It was a claim for personal injuries as a result of an accident on the K.L./Sungai Besi road which serves as the main highway to Serdang from Kuala Lumpur. It is 22 feet wide near the place of the accident and the area is a built-up area in the sense that there are houses on both sides of it, and not in the sense as we understand it as a speed-limit area. Briefly the plaintiff's case was that in trying to avoid a child crossing the said road, about 10 feet ahead of him, he swerved his motor cycle to the left and in doing so crashed into a 32" steel pipes which had been left lying about 3 feet to 4 feet from the nearside edge of the said road for the past one or two years. The pipe had a sharp steel-rim edge exposed and that constituted, as the learned trial judge held, a potential danger to road users. As a result his left leg was amputated. Quantum was agreed at \$35,000. The case was founded on alleged negligence and alternatively on alleged nuisance. The learned trial judge held that on both issues the defendant was wholly to blame. Hence this appeal.

The facts in essence are simple, and were related by the learned judge as follows:

"At all material times, the plaintiff was the rider of motor cycle BG8432 and the defendant was a contractor under contract with the Selangor State Government for laying 32 inch pipes along Jalan Sungai Besi/Kuala Lumpur and was at all material times in charge of storing and laying the said pipes. There were 32 inch pipes stored along the side of Jalan Sungai Besi on the material date. On June 1, 1972 at about 1.30 p.m., the plaintiff was riding his motor cycle along Jalan Sungai Besi from Kuala Lumpur to Sungai Besi. After passing the junction of Jalan Kuchai Lama for a distance of about three lamp posts, (approximately 200 feet), a boy crossed the road from left to right about 10 feet away. He applied the brake and swerved to the left to avoid the boy. In so doing, he knocked into the pipes lying on the road side. He indicated that he came from the direction of the stationary motor car shown in photo 3 in the Non-Agreed Bundle. The pipes are also shown in that photograph and in photos 1 and 2. The left side of the motor cycle and plaintiff's left leg hit the pipes. The plaintiff agreed that he used the road daily and he knew the pipes were lying by the side of the road for one or two years."

The learned judge found the following facts:

(1) The pipes had been lying there for at least two years. (2) The outer edges of the pipes seemed to have worn out exposing sharp steel rims. (3) These pipes are shown from the photograph to be lying very close to the edge of the road. (4) There was no warning sign at or around the place of accident."

There is no dispute with regard to (1) and (3).

With regard to (2), it was contended before us that there is no evidence that the ends of the pipes had sharp edges. It is in evidence that the pipes were left by the roadside for an unduly long time. Did they expose sharp edge rims at both ends? It is common knowledge that these pipes are such that they are to be connected with other pipes so that it is necessary to have sharp edge rims at both ends for this purpose. The photographic evidence highlights this point. A consideration of all these relevant facts led the learned judge to form the view that "their edges were so worn out exposing steel rims that they were potentially dangerous to road users". That is a question of fact with which this court is loath to

interfere. In an appeal against a finding of fact, however much the appellate court may be in an equal position with the trial judge as to the drawing of inferences, the appellate court ought not to reverse the finding of fact unless it is convinced that it is wrong. If that finding is a view that is reasonably open on the evidence, it is not enough to warrant its reversal that the appellate court could not have been prepared on that evidence to make the same finding. In any case, an appellate court is not bound to reverse the trial judge's finding of fact merely because it holds a different opinion to that of the trial judge. Where the members of the appellate court are themselves not unanimous on a particular point, there would seem to be good reason to doubt the propriety of reversing the trial judge if his finding is really open on the material before him.

With regard to (4), it was said on behalf of the defendant that there was a warning sign that pipe laying work was in progress along the said road, but it was conceded that there was no warning sign at or near the particular spot of the accident because it was said that at that time work was not in progress. I think this aspect of the case bears some relevance when I consider the duty-relationship between the defendant and the plaintiff.

Reference was made to the provisions of the Minor Offences Ordinance, 1955, in particular section 12(a), but in my view nothing turns on this. On the analogy of *Hollington v. Hewthorn & Co. Ltd.*,⁽¹⁶⁾ breach of the provisions of section 12(a) is irrelevant. The court is not concerned with its operation to determine the civil liability of the defendant. In fact, the learned judge recognised this aspect of the case when he took an alternative view of the section. He said this: "I hasten to add that the civil liability of the defendant may not be wholly dependent upon the breach of this provision, in the event there is a breach".

Counsel, on behalf of the defendant, admitted liability but argued there was contributory negligence on the part of the plaintiff. He said both were equally at fault, and that at the most liability on the part of the plaintiff ought to have been assessed at 75% and on the part of the defendant at 25%.

As a starting point it is trite law that an alternative claim in negligence and nuisance is permissible (see, for example, *Crane v. South Suburban Gas Co.*⁽¹⁷⁾ and *Dymond v. Pearce*).⁽¹³⁾ But the differences between cases of nuisance and cases of negligence must never be lost sight of (per Lord Sumner in *Latham v. R. Johnson & Nephew, Ltd.*).⁽¹⁸⁾ The differences are these: first, that negligence is not an element in nuisance, and, secondly, that where the nuisance, in respect of which a private person sues, is a public nuisance, he must prove special damage. It is also well to remember how far from its former scope and meaning nuisance has strayed, largely, by reason of the impact of the law of public nuisance upon the original concept of that tort.

The claim in negligence postulates a breach by the defendant of some duty owed by him to the plaintiff. Accordingly the first question to be asked and answered is whether a duty was owed to the

plaintiff by him of which he committed a breach. In order to determine the existence of this duty, I think a citation of two passages from well-known judgments are relevant. The first is from the judgment of Brett M.R. in *Heaven v. Pender*:⁽¹⁹⁾ "Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The second is from the famous dictum of Lord Atkin in *Donoghue v. Stevenson*:⁽²⁰⁾ "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." See also the latest exposition of the law based on the neighbour-principle in the speech of Lord Wilberforce in *Anns v. London Borough of Merton*.⁽²¹⁾ It may be noted that there is no negligence in the abstract but a duty related to the particular circumstances of the plaintiff. The liability only arises "where there is a duty to take care and when failure in that duty has caused damage": per Lord Macmillan in *Donoghue v. Stevenson* (*supra*, page 618). Such a duty only arises to those persons so placed that they may reasonably be expected to be injured by the acts or omissions of the defendant (see *Hay or Bourhill v. Young*).⁽⁹⁾ Foreseeability is an essential ingredient (see *The Wagon Mound* (No. 2)).⁽²²⁾ Thus, where the act of a third party is reasonably foreseeable, the defendant owes a duty to take care that it does not occur. In *Scott v. Shepherd*⁽²³⁾ the defendant threw a lighted squib into a crowded market place. A third party picked it up and threw it again acting in self-prevention and for the protection of property. It hit the plaintiff in the face and exploded causing him to lose an eye. It was held to be no defence to the defendant that the plaintiff would have suffered no damage had not the third party picked it up and threw it a second time. In *Shiffman v. The Venerable Order of the Hospital of St. John of Jerusalem*,⁽²⁴⁾ a flag-pole was insecurely erected in Hyde Park. Some children while playing there observed this and in trying to bring it down, it fell on and injured the plaintiff. The owner of flag-pole was held liable for not anticipating that the children would interfere with it.

It seems clear that the "acts or omissions" are the alleged acts of negligence, and that Lord Atkin's test of whether the plaintiff was the defendant's neighbour, can only be applied *ex post facto* (see *Winfield and Jolowicz on Tort*, 10th Ed. (1971) page 54). In *Thompson v. Bankstown Corporation*⁽²⁵⁾ it was said: "In the application of these formulas it is important to avoid the error of confusing the precise chain of circumstances by which the plaintiff incurs the injuries or damage of which he complains with the question whether he, acting as he did, falls within

A the general description of persons likely to be affected. The exact course which events take can seldom be foreseen in detail."

Was the defendant under a duty to the plaintiff? Can it be said that he had only a duty to lay the pipes under contract with the State Government, and so long as this duty was complied with and that he had put up warning signs to that effect, he had no duty at all to consider unnecessary hazards to any such person in the situation of the plaintiff, not even if there existed various means to eliminate them? In my opinion, any such proposition in relation to the defendant's action is untenable. At the present time, when road works, and works involving laying of electricity and telephone cables and water pipes adjoining the highway, are part of the realities of life, a duty to take reasonable care is owed to road users who may *inadvertently* (emphasis is mine) leave the road and collide with them. The law on this point has not changed because nowadays one comes across large numbers of such cases where contractors leave unnecessary hazards on land adjoining the highway and no one seems to object. If the proposition of the no "duty — relationship" is accepted, the effect of *Donoghue v. Stevenson, supra*, would be so radically curtailed as to be virtually eliminated. As was said by Lord Macmillan in that case, the categories of negligence are never closed which means at least, as Asquith L.J. said in *Candler v. Crane Christmas & Co.*⁽²⁶⁾ "that in accordance with changing social needs and standards new classes of persons legally bound or entitled to the exercise of care may from time to time emerge". In *Levine v. Morris*⁽⁷⁾ a case relied on heavily by the plaintiff and which was considered by the learned judge, where an analogous point arose, it was held that the Ministry of Transport, when siting road signs by the side of a "fast traffic highway" — 4 feet from the near edge of the highway — owed a duty to a motorist who may inadvertently leave the road and collide with them. All three judges of the Court of Appeal were unanimous on the analogous point raised that any such proposition taken on behalf of the Ministry was too narrow a view of the duty of the Ministry. Sachs L.J. had this to say (page 148):

"It is well known that on high speed roads there is a risk of motorists going off the carriageway inadvertently through no fault of their own, especially in bad weather. There are many potential causes of such inadvertent happenings, such as, for example, tyres that burst or, unknown to the driver, are out of balance; indeed, one could frame a long list of causes which carry no blame on the driver. In addition, there are cases in which the accidents are due to that category of negligence which, to adopt the words of Lord du Parc in *London Passenger Transport Board v. Upson*: 'experience and common sense teach' is likely to occur. The chances of such accidents happening ought always to be borne in mind by the Ministry, and the extent of those chances should be assessed. The Ministry owe to motorists at least a duty when siting massive signs to take reasonable care when there are two sites equally good as regards visibility not to select the one that involves materially greater hazards to the motorist."

Widgery L.J. was of the same opinion (page 150):

"The first submission of counsel for the Ministry, as I understand it, is that when siting the sign the Ministry of Transport had no duty of care towards a motorist who was himself guilty of negligence and whose negligence had caused his car to leave the carriageway and thus to be at risk of colliding with the sign. In my opinion, this is far too

narrow a view of the duty of the highway authority. All motorists are guilty of errors of one kind or another on one occasion or another, and I think it would be quite unreal if roads were designed on the assumption that no driver would ever err. Indeed, as Lord du Parc put it in *London Passenger Transport Board v. Upson* (supra, page 176) "...a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common." It seems to me that that phrase is entirely apt to dispose of the submission that no duty of care was owed to a motorist in the position of the driver in this case. Of course, the duty of the highway authority is limited by the fact that it is only required to do what is reasonable in order to avoid reasonably foreseeable accidents."

Russell L.J. put it in similar vein (page 152):

"The contention that in siting these signs the Ministry had no duty of care to vehicles leaving the road because of negligent driving cannot be supported. Counsel for the Ministry in submitting this had to go to the length of suggesting that equally there was no duty owed towards a vehicle leaving the road without negligence, and this seems to me to be plainly wrong. The presence of these traffic signs on four substantial concrete posts just off a fast traffic highway is a plain danger to vehicles which leave the highway whether through negligent driving or without negligence. It is well known that vehicles do leave such a highway at speed from time to time. The duty to take reasonable care to avoid a danger obviously does not require the Ministry not to erect such signs at all at places appropriate to their function, but the duty does, in my view, require that reasonable steps to minimise the dangers should be taken. If a choice of sites is available, both consistent with the proper functioning of the sign, then, in my judgment, the duty of reasonable care requires that consideration be given to the question of relative probability of a vehicle leaving the road and passing over one site rather than the other."

There is no doubt that there was a duty — relationship between the defendant and the plaintiff who may inadvertently leave the road and collide with the pipes. A person who maintains any thing on, under, above or adjacent to a highway owes a duty to persons lawfully using the highway to prevent damage to their person or property. This duty is no higher than a duty to exercise reasonable care to see that persons using it are not unduly inconvenienced or injured by any carelessness on the part of the defendant. The duty is a duty to take reasonable care and not a duty to put up warning signs. Lord Macmillan's dictum in *Bourhill v. Young* (supra, page 104) "The duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed" bears the same meaning as Lord Atkin's description in *Donoghue v. Stevenson* (supra, page 580), viz: "Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." It seems to me that the plaintiff, acting as he did, fell within the general description of persons likely to be affected by the defendant's action.

The question of liability is whether the defendant had observed the standard of care required by the circumstances of the case in relation to the plaintiff. The test and scope of this duty is whether the defendant ought to have contemplated as a reasonable man that if he did not take steps to eliminate the unnecessary hazards adjoining the highway he would cause danger of injury to the plaintiff, arising inadvertently by coming into contact with the exposed sharp steel-rims. It is not as a matter of law necessary that the

defendant should have anticipated the exact accident that ensued but the likelihood of an accident with the said pipes. Why should not this probability or possibility be regarded as within reasonable foresight? It is a matter of fact that the pipes had been lying so close to the highway for an unduly long time that their outer edges had worn out exposing sharp steel-rims. In the circumstances it seems proper to impute to the defendant knowledge that a person in the situation of the plaintiff, lawfully using the highway, would be apt for one reason or another to come into contact with the exposed danger. I reiterate what was said in *Thompson v. Bankstown Corporation*, supra, "The exact course which events take can seldom be foreseen in detail." The fact that the plaintiff had failed to keep a proper look out, or that he had been negligent, does not take him out of the scope of persons whom the defendant could reasonably contemplate might be affected by his neglect. Even the most skilled driver, taking reasonable care for his own safety, may inadvertently come in contact with the exposed sharp steel-rims. In my judgment, once the possibility of a causal act of inadvertence is taken into consideration — an act which may result in injury — it is impossible to say that a consequential duty to adopt precautions before it culminates in injury are not needed.

I conclude on the evidence that it was the duty of the defendant, strictly speaking, the duty of his kepala and engineer to whom he had left the matter entirely, when placing the pipes to consider the risk of collision as one of the factors affecting the said work. If that had been done by any competent contractor, it seems to me that he would have both recognised a serious hazard presented by the pipes in that condition, and the comparative ease with which that hazard could have been avoided by, for example, not placing the pipes at that particular spot for an unduly long time before work commenced. It seems to me clear that the failure to consider those factors and to reach that conclusion, and having reached the conclusion to put it into effect, constituted a breach of duty on which the plaintiff relied in this case.

It cannot be said that if the plaintiff had kept a proper look-out, or if he had reduced speed or if he had applied his brakes in time, he would not in all probability have been faced with the sudden emergency and gone to the left and collided into the said pipe. It also cannot be said that he ought under the circumstances to have gone to the right, and if he had done so, he would not have collided into the said pipe. This, if I may say so, is looking at the situation with the benefit of hindsight. This proposition is no doubt founded on the allegation that he was partly to blame for the injury to himself. Was the plaintiff negligent? It is relevant in testing the existence of this liability to quote a passage from the judgment of Wilmer L.J. in *Brophy v. Shaw*⁽²⁷⁾ (unreported) which was cited and applied in *K.R. Taxi Service Ltd. v. Zaharah*⁽²⁸⁾ "The defendant's (driver of a motor car) duty, like that of any other road user, was to exercise reasonable care. He was not under a duty to be a perfectionist. It would be going too far to say that in the circumstances surrounding this accident the defendant should have

observed the negligent and irresponsible action of these two men (one of them was the plaintiff) earlier than he did." I think that case is on all fours with the present case. In that case the plaintiff (in the present case the boy) darted into the defendant's path and the learned judge held that the plaintiff's action was about as negligent and irresponsible as anything could be and he lost his case. *Edwards v. Nobbs* (unreported) which was also cited in *Zaharah's, supra*, case carried the same point. There is no evidence in the present case that the plaintiff was travelling at an excessive speed under the circumstances. There is also no evidence of the interval of time and space affording him opportunity to avoid the consequence of the boy's recklessness after he should reasonably have anticipated danger. It therefore seems to me that in the absence of such evidence the inference of lack of care cannot be legitimately drawn. Even if the plaintiff had seen the boy earlier on, he could not have expected the boy to dart into the road in front of an oncoming vehicle, and even if he had seen him at the moment he darted out it was questionable whether it would have been wise for the plaintiff to swerve to his right. In this connection it is sufficient if I again use the reasoning I applied in *Govinda Raju v. Laws*⁽²⁾ viz: "When a plaintiff is perplexed or agitated when exposed to danger by the wrongful act of another, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence." In that light it cannot be now said that the plaintiff was partly to blame for the injury he sustained. The law is content to take the cavalier view that a driver of a motor car travelling along a main highway is under no duty to be on the look-out for anybody suddenly darting out into the road in a negligent and irresponsible manner.

In a clear and careful judgment, the learned judge also found that the pipes, in the condition in which they were, constituted a danger to those using the K.L./Sungai Besi highway — that is, they constituted a nuisance. Can this conclusion be supported? I think it is necessary to determine the legal definition of highway nuisance. The relevant law is conveniently stated in a passage in *Salmond on Torts*, 16th Ed. at page 82: "Public nuisance to a highway consists in obstructing the highway or rendering it dangerous." Denning L.J. recognised the existence of these two categories in *Morton v. Wheeler*⁽²⁹⁾ when he said:

"As all lawyers know, the tort of public nuisance is a curious mixture. It covers a multitude of sins. We are concerned today with only one of them, namely, a danger in or adjoining a highway. This is different, I think, from an obstruction in the highway. If a man wrongfully obstructs a highway, or makes it less commodious for others (without making it dangerous) he is guilty of a public nuisance because he interferes with the right of the public to pass along it freely. (Then a little later he said): Danger stands, however, on a different footing from obstruction."

The present case is concerned with danger arising from the condition of the pipes bordering the highway. *Salmond* gives a number of examples and a reference to these examples seems to me to show that *prima facie*, at any rate, when one speaks of danger

A to a highway one means something done in the highway itself or by something done on the land which adjoins it. Thus allowing a fence immediately adjoining the highway to become ruinous and dangerous is a nuisance (see *Harrold v. Watney*).⁽³⁰⁾ In that case the infant plaintiff was lawfully using the highway and on the other side of the fence was a ground on which boys were accustomed to play. That attracted him and he wanted to go to the playground by climbing over the fence. He had put one foot on it and was about to put the other on, when it came down and injured him. That decision supports the case of *Jewson v. Gatti*.⁽³¹⁾ In that case there was a cellar beside the highway in which scene-painting was going on. There was a bar round the opening; a passing child naturally leaned on the bar to see what was going on down there; the bar gave way and he fell into the cellar and was injured. Lord Esher M.R. in giving judgment said: "This was a case of premises on the highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected without any regard to the safety of the public, and that by itself might be sufficient to sustain a case for the plaintiff."

E I agree with the learned judge that on the facts the only conclusion to be arrived at is that the pipe, in the condition in which it was constituted an actionable nuisance at the time when the plaintiff crashed into it. The leaving of a dangerous pipe for a considerable period close to the highway, *prima facie*, resulted in a nuisance being created, for it was caused by something done on the land bordering the highway.

F But the mere fact that the pipe was a nuisance does not render the maker liable to the plaintiff in damages unless its being in that position was a cause of the accident. It entails the question whether the nuisance was causative of the accident? When it was suggested that the answer was in the negative, that amounted to a suggestion that the accident was not caused by the nuisance, but by the conduct of the plaintiff in trying to avoid the boy darting into his path. In my view, looking at the facts of this case, it is not true to say that the accident was caused by the conduct of the plaintiff. It seems to me the defendant caused the nuisance which clearly gave rise to danger to road users. What constituted danger was answered by Denning L.J. in *Morton v. Wheeler, supra*, in these words:

H "But how are we to determine whether a state of affairs in or near a highway is a danger? (and answered) This depends. I think, on whether injury may reasonably be foreseen. If you take all the cases in the books, you will find that if the state of affairs is such that injury may reasonably be anticipated by persons using the highway, it is a public nuisance ... but if the possibility of injury is so remote that he (the reasonable man) would dismiss it out of hand, saying 'Of course, it is possible, but not in the least probable', then it is not a danger."

I This question of danger is inextricably linked up with that of causation. "In an action for private damage arising out of a public nuisance, the court does not look at the conduct of the defendant and ask whether he was negligent. It looks at the actual state of affairs as it exists in or adjoining the highway, without regard to the merits or demerits of the

defendant. If the state of affairs is such as to be a danger to persons using the highway ... it is a public nuisance. Once it is held to be a danger, the person who created it is liable unless he can show sufficient justification or excuse." (See *Morton v. Wheeler*, *supra*). Therefore "if deliberately created and clearly giving rise to danger to road users, fault is implicit and liability incontestable" (per Edmund Davies L.J. in *Dymond v. Pearce*, (*supra*, at [1972] All E.R. page 1150).

The answer to the question is that the highway is normally used for passage and repassage (see *Harrison v. Rutland (Duke of)*,⁽³²⁾ and if the defendant left a nuisance so close to a highway and it was extremely likely to cause injury to persons using it, it was the nuisance which was the cause of the injury to the plaintiff, and the defendant cannot resile from the conclusion by relying on the act of the plaintiff in trying to avoid the boy because that act could have been prevented if he had kept a proper lookout, or if he had applied his brakes in time, or if he had travelled less slowly than he did (see *Govinda Raju v. Laws*, *supra*). I think cases like *Barnes v. Ward*,⁽³³⁾ and *Ann Hardcastle v. The South Yorkshire Railway and River Dun Company*⁽³⁴⁾ carry the present case. The principle of both the cases is that where a source of danger is made substantially adjoining a public highway, an action lies against the maker by a person who has strayed off the highway and fallen into it, or who has made a false step or became giddy and left it and sustained injury.

It was further argued that since quantum was agreed upon at date of trial interest on damages should be awarded from date of judgment and not, as the learned judge held, from date of service of writ. Counsel did not elaborate on it, and the matter was left there without it being fully argued before us.

The power of the court to award interest on damages is contained in section 11 of the Civil Law Act, 67 of 1956 (see also O.40, r.11 of the Supreme Court Rules). This section gives the court power, if it thinks fit, to order that there shall be included in the sum in which judgment is given interest at such rate as it thinks fit on the whole or any part of the damages for the whole or any part of the period (emphasis mine) between the date when the cause of action arose and the date of judgment. Therefore, in proceedings for the recovery of damages, the court generally exercises its power so as to include in that sum interest on those damages or on such part of them as it considers appropriate, unless it is satisfied that there are special reasons why no interest should be given. The basis of an award of interest is that the defendant has kept the plaintiff out of his money and has had the use of it himself, so he ought to compensate the plaintiff accordingly. Section 11 of the Civil Law Act is, I think, modelled on the provisions of section 3(1) of the (U.K.) Law Reform (Miscellaneous Provisions) Act, 1934, and those provisions have been judicially considered in a number of cases, where the courts have laid down certain guide lines (see, for example, *Jefford v. Gee*).⁽³⁵⁾

In proceedings for the recovery of damages for personal injuries, the court awards one lump sum,

and it is under no duty to divide up the award between component elements, the sum assessed being one overall payment adjudged to be a fair compensation. Interest should therefore be awarded on this lump sum as from the date when the defendant ought to have paid it, but did not, for it is from that date that a plaintiff can be said to have been kept out of his money. This date is normally "from the time of action brought at all events": per Lord Herschell L.C. in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*⁽³⁶⁾ which was applied in *Jefford v. Gee*, *supra*. If the plaintiff had paid the amount into court, and the plaintiff had taken it out of court in satisfaction of the claim, then that is the end of the matter. He gets no interest because there is no judgment. If a defendant wishes to avoid the payment of interest he should in future make his payment into court an amount which he says is sufficient to satisfy the cause of action apart from interest.

In the result I am not persuaded to take a contrary view that interest ought to be awarded from the date of judgment.

For these reasons I am of the opinion that the appeal should be dismissed with costs, and judgment that the defendant is wholly to blame upheld.

Appeal dismissed.

Solicitors: *Mah-Kok & Din; R.K. Nathan & Co.*

LETCHUMANAN CHETTIAR v. PALANIAPPA CHETTIAR

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.J.J.) August 19 and September 24, 1977]
[Kuala Lumpur — Federal Court Civil Appeal No. 47 of 1977]

Hindu Law — Joint Hindu Family — Deceased member of joint Hindu Family — Will made by deceased — Application of Mitakshara law — Action for partition brought by applicant — Applicant separated from joint Hindu Family — Whether testator can dispose share in undivided assets of Joint Hindu Family — Probate and Administration Act, 1959, ss. 22, 24 — Distribution Ordinance, 1958.

Probate and Administration — Will — Application for probate — Whether court concerned with validity of bequests — Hindu law — Joint Hindu Family — Probate and Administration Act, 1959, ss. 22 and 24.

This was an appeal from the decision of Ajaib Singh J. ([1977] 2 M.L.J. 258). The deceased died testate leaving all his "estate and effects of whatsoever nature and wheresoever situate in India, Burma, Malaysia, Singapore or elsewhere including movable and immovable assets found belonging to (him) personally as (his) separate property together with all the endowments therefrom when accounts are taken in respect of PLAR. Firm at Port Dickson in connection with the judgment and order in the matter of Civil Suit No. 34 of 1951 in the High Court at Seremban plus (his) one-third share of all the movable and immovable assets in the joint Hindu family firm of PLAR. at Port Dickson." The appellant, a son of the deceased, claimed to be the executor appointed under the will and applied for probate. The respondent, his step-brother, entered a caveat and claimed to be a coparcener in the joint Hindu family. Earlier the respondent had filed a suit for partition of the joint family property. Nevertheless the respondent claimed to have a share in the joint Hindu family firm of PLAR. The learned trial judge stated that the only issue left to be determined was whether the deceased could lawfully dispose of by will his one-third share in the joint Hindu family firm of PLAR. in Port Dickson. He